IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

ARLIE COX,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.
No. .....

BRIEF

In Support of Petition for Writ of Certiorari.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals has not yet been reported but was decided on March 5, 1945.

JURISDICTION.

1. The date of the judgment to be reviewed is March 5, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Section 240A of the Judicial Code (28 U. S. C. 347).

STATEMENT OF THE CASE.

A statement of the case has already been made in the preceding petition which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

1. The court erred in holding the indictment sufficient.

2. The district court erred in the reception of evidence and instructions to the jury.

3. The court specifically erred in failing to define a "wilful" violation of a ration regulation and instructed the jury that a case is made out by simply proving a violation.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A.

The Indictment Is Insufficient to Charge a Violation of Federal Law.

1. The regulations of the Office of Price Administration are changed from time to time, from day to day. A presumption that the accused knows the regulations are different than a presumption that an alleged violation was wilful and knowing more than knowledge of the regulation is required to make a wilful violation. "**The law under which one accused and tried for crime should be fixed and uniform in such fashion and with such permanency as to be known and understood by the Courts and the members of the profession,** and courts of last resort should not vacillate in their determination so as to change in the absence of impelling legal reasons. To be punishable as a crime the act must be a crime at the time of the act and at the time it is sought to punish therefore, and if not a crime at both times it is not punishable as a crime."

22 C. J. S., pp. 66, 67, Sec. 17.

2. When a federal criminal law is repealed the prosecution must cease.

Green v. United States, 67 F. (2d) 846;
22 C. J. S., Sec. 27, p. 80.

3. The objection that the complaint or indictment did not state an offense was first raised in the district court or trial court, next in the Circuit Court of Appeals, and now in this Court. Such questions may be raised at any time even on appeal for the first time.

Zoline, Federal Criminal Law & Procedure, Sec. 422, Note 2;

Wiborg v. United States, 163 U. S. 632, 41 Law. Ed. 289, 298;
Weems v. United States, 217 U. S. 349-362, 54 Law. Ed. 793-796, 30 Sup. Ct. Rep. 544.

"There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute, United States v. Lacher, 134 U. S. 624, 628, 33 L. Ed. 1080, 1083, 10 Sup. Ct. Rep. 625. In United States v. Chase, 135 U. S. 255, 34 L. Ed. 117, 10 Sup. Ct. Rep. 756, 8 Am. Crim. Rep. 649, the indictment was under Par. 1 of the Act of July 12, 1876, Chap. 186, 19 Stat., at l. 90, Comp. Stat., Par. 10,381, declaring "every . . . book, pamphlet, picture, paper, writing, print or other publication of an indecent character" to be unmailable, and making their deposit in the mails an offense. The question was whether to send an obscene letter by mail violated that section. The court held that the letter was not a writing within the meaning of the statute. It said (p. 261): "We recognize the value of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed by the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

71 Law. Ed., pp. 445, 446.

4. **The indictment does not negative any exceptions such as were contained in the ration regulations from time to time.** This defendant is a farmer. He was shown by the evidence without dispute to have sold farm tires, or truck tires, or implement tires. Used truck and implement tires

were excepted from rationing. No offense was alleged in the indictment without negativing these exceptions.

5. The court erred in not sustaining the motion of defendant-petition to quash the indictment in this cause, and each and every count thereof. The indictment does not charge a criminal offense of any kind or character.

Hammer v. U. S., 134 F. (2d) 592;
Burton v. U. S., 202 U. S. 344;
Fuller v. United States, 114 F. (2d) 698;
U. S. v. Wills, 36 Fed. (2d) 855.

This rule has been consistently followed and is now well established law.

Reing v. United States ex rel. Girard, 84 F. (2d) 624;
Walkner v. United States, 79 F. (2d) 269;
Stetson v. United States, 257 Fed. 689;
United States v. Moore, 11 Fed. 689;
United States v. Mandelsohn, 32 F. Supp. 622;
United States v. Union Pacific R. Co., 20 F. Supp. 665.

6. A situation relating to the rule requiring the negativing of exceptions where a license or permit to do an act is required and similar to the case at bar prevailed in Fuller v. United States, 114 Fed. (2d) 698, where the Court stated:

"Actually the Gold Reserve Act of 1934 and regulations thereunder permit certain acquisitions and transportations—among other, the acquisition and transportation of fabricated gold, metals, containing gold, unmelted gold in its natural state—without the necessity of obtaining or holding any license therefor. And ordinarily, when licenses are required, they may be and are issued by the United States assay office at New York. Hence, an acquisition or transportation of gold without and not in pursuance of, a license issued

by the Secretary of the Treasury does not violate the Act or any regulation thereunder unless such acquisition or transportation is one for which a license is required and for which no license has been issued by a United States mint or by the United States assay office at New York."

Point B.

The Defendant Was Deprived of a Fair and Impartial Trial for the Three Reasons as Follows:

1. **The Court erroneously instructed the jury:**

"Wilfulness, as used in a criminal statute, means the doing or omitting to do a thing knowingly and wilfully. It implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it."

Potter v. United States, 155 U. S. 438, 446, 39 L. ed. 214, 217, 15 S. Ct. 144;
Felton v. United States, 96 U. S. 699, 702, 24 L. ed. 875, 876;
Spurr v. United States, 174 U. S. 734, 43 L. ed. 1152, 19 S. Ct. 812;
Murdock v. United States (C. C. A. 7th), 62 F. (2d) 926, reversed in U. S. v. Murdock, 290 U. S. 389-398, 78 L. ed. 281-287.

"Accused is entitled to an instruction enlightening the jury upon the subject of wilfulness and advising it that it should consider the good faith or honest belief, if any, of the defendant, in determining whether his conduct was wilful."

Potter v. United States, 155 U. S. 446, 39 L. ed. 217, 15 S. Ct. 144.

"Whether guilty or innocent, the defendant has the right to a fair and impartial trial. He is entitled to have the jury properly and correctly instructed upon the law.

The law does not provide one method for trying innocent persons and another for trying guilty persons."

People v. Garines, 314 Ill. 413, 145 N. E. 699;
People v. Gardiner, 303 Ill. 204, 135 N. E. 422;
People v. Newman, 261 Ill. 11, 103 N. E. 589.

"An accused is entitled to be tried by an impartial and fair Judge who shall maintain his role of Judge and not assume that of prosecutor."

U. S. v. Laudani, 134 F. (2d) 847;
U. S. v. Domres, 142 F. (2d) 477;
U. S. v. Hoffman, 137 F. (2d) 416;
Hall v. U. S., 150 U. S. 76.

In the Hoffman case cited above it is held "in prosecution for wilfully failing to report for induction into army at time and place fixed in notice, the assiduity of trial judge in securing a conviction required that defendant be granted a new trial."

In the Domres case, also cited above in this connection, the court held that "an accused is entitled to be tried by an impartial and fair Judge, who shall maintain his role of judge and not assume that of prosecutor."

In the Laudani case cited above it is held that "the presiding Judge, by declining to interpose, notwithstanding defendant's protest against proper argument, gave the jury to understand that they might properly be influenced by it, and thereby committed error manifestly tending to prejudice defendant with jury, and was a proper subject of exception, and would have required a new trial if insufficiency of indictments had not put an end to the prosecution."

The attitude of the Court, in the instant case, became manifest early in the trial. The District Attorney referred, in his opening statement to the jury, to the violation with which the defendant-appellant was charged as "Black

Market." The Court overruled the objection, stating: "It is a matter for the jury. If a man does violate the regulations here he might be engaged in black market. It may stand for the present. If I find at a later time that the evidence doesn't bear that out, it may be stricken." This remark was not subsequently stricken (T. of R. 15; R. 30).

While counsel for defendant-appellant was making his opening statement to the jury he said, "These witnesses were living in fear." The District Attorney objected to the statement and the Court stated: "Sustained and the remark will be stricken from the record, and if Counsel persists in such remarks I shall have to punish him for contempt of court" (T. of R. 16; R. 32).

In the Court's charge to the Jury the Court not only undertook to instruct the Jury on questions of law, but attempted to summarize the evidence. In the summary made by the Court questions of fact which were solely within the province of the Jury to decide were decided by the Judge.

In criminal cases the court must instruct the jury on all the essential questions of law, whether requested or not.

The Court erred in refusing to charge the jury with the following instructions requested by defendant-appellant:

> "The Court instructs the Jury that under Ration Order 1-A and the Amendments thereto, you must find the defendant not guilty if you find from the evidence that the tires which were alleged to have been sold were either of the following:
>
> (a) Used solid tires.
> (b) Used implement tires.
> (c) Used tractor tires.
>
> "By virtue of an amendment to the regulation issued on the 28th day of September, 1943, the Office of Price Administration released from rationing these tires to encourage the full use of used tires of the character mentioned" (T. of R. p. 94; R. 144).

The holding in the case of U. S. v. Pepper Brothers, 142 Fed. (2d), would indicate that the law is that the amendments to the regulations set out in the indictment should have averred and not omitted.

2. **All of the following instructions tendered by the defendant were refused:**

"The Court instructs the Jury that a defendant is under no obligation to testify in his own behalf and that his neglect to testify shall not raise any presumption against him" (T. of R. p. 94; R. p. 145).

"The Jury are instructed that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the Jury in this case, as in all criminal cases; and it is the duty of the Jury to give the defendant in this case full benefit of this presumption and to acquit the defendant unless the evidence in this case convinces them of his guilt as charged, beyond all reasonable doubt" (T. of R. p. 94; R. p. 147).

"The Court instructs the Jury that the defendant is presumed to be innocent until proven guilty beyond all reasonable doubt. This presumption is not to be lightly set aside by you, but you should give the benefit of this presumption to the defendant at all times. The indictment in this case is not to be considered by you as evidence. Nor are you to enter the case with the feeling that unless the defendant were guilty, he would not have been indicted, because to do so would deprive the defendant of the benefit of the presumption of innocence which the law gives him" (T. of R. p. 96; R. p. 154).

"The Court instructs the Jury that the burden of proving, beyond all reasonable doubt, every material allegation necessary to establish the defendant's guilt, rests upon the government throughout the trial and the burden of proof never shifts to the defendant" (T. of R. p. 95; R. p. 149).

"The Court instructs the Jury that you have no right to presume that a tire was a new tire simply because it has been referred to as a new tire by a witness. In this case when the word 'new' is used, it means a tire which has been driven less than one thousand miles, and the burden of proving beyond all reasonable doubt that the tires were new is upon the Government. If you have a reasonable doubt as to whether the tires were new or used, then you must return a verdict for the defendant" (T. of R. p. 95; R. p. 152).

"The Court instructs the Jury that if after you have heard all the testimony that the conviction of the defendant depends upon the evidence of Roy W. Jones, William Lucker and Wayne Hanselman, and you cannot say whether their evidence was given because of duress of fear of punishment so that you cannot say beyond a reasonable doubt after considering all the evidence that their evidence is true, then you must find the defendant not guilty" (T. of R. p. 96; R. p. 155).

3. **The Court invaded the province of the jury.**

It was reversible error to give the jury instructions which tended to coerce their verdict.

A consideration of the court's instructions to the Jury discloses that the charge contained in the indictment and the evidence submitted in regard to the charges therein contained, were misinterpreted by the trial court, when the Jury was instructed as follows:

"* * * there is but one issue in this case. It is a rather narrow one, that is, whether the defendant sold tires without requiring the surrender of rationing certificates. That's the only issue which is before you, and, as a matter of fact, if he did, he is guilty. If he did not, he is not guilty."

"The regulations, which have the effect of law, governing this matter and which are relied upon in the

indictment are two sections. The first provides that no person shall sell or transfer a rationed commodity except by compliance with the provisions of the rationing regulations. Tires are a rationed commodity, and it is charged in the indictment that this defendant did violate the provisions of the law by selling and transferring a rationed commodity, namely, tires without complying with the provisions of the rationing regulations.

"The other provision of the regulations involved is that no person shall make a transfer of any tire except by compliance with the rationing regulations" (T. of R. 71, R. 124).

"It is charged under these two sections that this defendant at various dates in 1944, sold various rationed tires without complying with the laws and regulations, namely, without requiring that the persons to whom he sold such tires should deliver to him rationing certificates permitting the purchase of the tires. This is the charge in this case."

"Something has been said about amendment to the regulations. There has been no amendment which bears upon this issue. The Office of Price Administration on the 28th day of August, 1943, did enter a regulation permitting, without certificate, the transfer of used tires to a dealer or manufacturer. There is no transfer to a dealer or manufacturer; consequently, that amendment has no application. Then, on September 28, 1942, the Office of Price Administration amended the regulation to provide that any person may transfer used solid tires, used implement tires and used tractor tires. No such tires are involved here; so neither of these amendments has any bearing whatsoever on the issue confronting you" (T. of R. 61; R. 125).

By virtue of the Court's instructions as set out above, the Jury was compelled to find the defendant guilty if they found that he sold tires of any type.

We respectfully submit that the court invaded the province of the Jury when the Court instructed the Jury that

the tires allegedly sold by the defendant were not of the type covered by Ration Order 1-A, and the amendments thereto, when the Court stated, "Consequently that amendment has no application . . . No such tires are involved here; so neither of these amendments has any bearing whatsoever on the issue confronting you" (T. of R. 71; R. 125). This part of the court's instruction was plainly coercive, and took from the jury the determination of an essential fact which only the Jury could decide. This was reversible error.

We further submit, in this same regard, that the court erred in this part of its charges: ". . . the question is, did he violate the law, did he sell the tires without requiring a certificate issued by the ration board. All of these witnesses have told you these were new tires, and so far as this record is concerned that stands uncontradicted. They were grade 1 tires. We are not so much interested in what grade the tires were, but we are interested in whether the tires were sold without requiring the certificates which were necessary."

It was a question for the Jury to decide as to whether or not the tires allegedly sold by the defendant violated the regulations set up by the controlling governmental agency. The Court decided, and so instructed the Jury, that the tires allegedly sold by the defendant did violate the regulations set up by the controlling governmental agency. The regulations exempt certain tires which could be sold without requiring ration certificates. It was for the jury to decide whether the tires allegedly sold by defendant-appellant fell within the exception.

These two propositions are clearly inconsistent with each other, and destroy the application of the doctrine of reasonable doubt. On this theory we cite Sallinger v. U. S., 23 Fed. (2d) 48, 52 (C. C. A. 8); Karchmer v. U. S., 61 Fed. (2d) 623; Gold v. U. S., 26 Fed. (2d) 16, 32 (C. C. A. 8); Mazurosky v. U. S., 100 Fed. (2d) 958, 961 (C. C. A. 9).

4. **The court admitted evidence which was at variance with the allegations of the indictment.**

The court erred in admitting into evidence the tires, allegedly sold by defendant-appellant to all of the Government witnesses (except John Pierceall, who testified as an expert witness for the Government).

Each of the above witnesses testified for the Government that the tires alleged to have been sold to them, and each of them, were "new" tires. Each of these witnesses were by occupation farmers and had no greater experience, relating to tires, than the average individual. Defendant-appellant's objection to their testimony on this point should have been sustained; whether the tires were new or not, in so far as these witnesses were concerned, was a conclusion drawn by them from their limited experience, and not as defined by the O. P. A. regulations.

Williams v. U. S., 140 Fed. (2d) 351;
U. S. v. S. B. Penick and Co., 136 Fed. (2d) 413;
U. S. v. San Francisco Electrical Contractors, 57 Fed. Supp. 57.

5. **The court erroneously admitted evidence by permitting lay witnesses to testify that tires were "new" as part of the proof of an offense against the ration regulations.**

The word "new" and the proof relating to whether the tires were "new" should have been. In accordance with the definitions set forth by the Office of Price Administration the word "new" was defined as follows:

O. P. A. Definition.

1315.201 (19) "**'New'** as applied to tires and tubes means a tire or tube that has been used less than one thousand miles."

None of the witnesses testifying for the Government, including the filling station attendant who qualified as an expert because of the fact that he had checked tires for the Office of Price Administration, attempted to state an opinion as to whether or not the tires which they had purchased or which were exhibits in the case had been used less than one thousand miles or more than one thousand miles. The prosecuting attorney and the witnesses used the term "new" in its ordinary accepted sense and not in the sense in which it is used in the ration regulation.

Further Definitions.

Likewise, the Office of Price Administration defined "Grade 1" as follows:

1315.201 (11) " 'Grade 1,' as applied to tires, means a new passenger type tire."

The Court Refused to So Instruct the Jury.

The trial court tried the case upon the theory that local ration boards were the only persons who might issue ration certificates and so instructed the jury. The Office of Price Administration defined a ration board as follows:

1315.201 Sub. Par. (2) " **'Board'** means War Price and Ration Board established by the Office of Price Administration or a plant area board established by the Office of Price Administration and designated by it to serve the workers and specified industry and extravation establishments."

The Trial Court Refused to So Instruct the Jury.

1315.201 (5) " **'Certificate,'** unless the context requires otherwise, means a certificate issued by a board or other person or agency designated by the Office of Price Administration, authorized the issuance of any tires, tubes, recapping service or camel back."

The defendant tendered an instruction defining the word "new" in the language of the ration regulations (T. of R. p. 95). This instruction was refused. The defendant requested the court to instruct the jury what constitutes "new" and "used" tires in the language of the ration regulation, but the court refused (T. of R. p. 76).

> "Mr. Tate: I would like to have the court instruct the jury what constitutes new and used tires in the language of the O. P. A. regulations.
>
> "The Court: In view of the evidence and the fact that evidence is undisputed that each and every one of these tires were new when transferred, I shall not do that.
>
> "Mr. Tate: I would like to have the court instruct the jury as to the meaning of the word 'vehicle.'
>
> "The Court: Do you want me to go through the A, B, C's?
>
> "Mr. Tate: The only way the jury can understand the regulations is to be instructed as to the definitions used by the O. P. A.
>
> "The Court: I think everything has been told them that they are interested in.
>
> "Everybody will leave the court room. When you have arrived at a verdict, you will sign it and let me know and then you will deliver it in open court."

Thus the jury was coerced not only in the language of the court but by its actions in compelling the jurors to remain in the jury box, thus intimating the court did not feel that the case merited too much consideration.

It Is Therefore Respectfully Submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decisions.

ARLIE COX,

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C. E. TATE,
Counsel for Petitioner.